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IN THE

Supreme Court of the United States

SAMUEL D. MOORE ET AL.,
Petitioners,

VS.

AFTRA HEALTH AND RETIREMENT FUNDS ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RECORD COMPANY RESPONDENTS

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are accurately set forth in the petition for a writ of certiorari.

The immediate parent company of respondent Sony Music Entertainment Inc. is Sony Music Holding Inc.; the ultimate parent company is Sony Corporation (Tokyo), whose shares are publicly traded. No other publicly held company owns 10% or more of respondent Sony Music Entertainment Inc.'s stock.

The parent company of respondent Bertelsmann Music Group, Inc. is Bertelsmann, Inc., which in turn is a wholly owned subsidiary of Bertelsmann AG. The shares of Bertelsmann AG are not publicly traded. No publicly held company owns 10% or more of respondent Bertelsmann Music Group, Inc.'s stock.

Respondent Polygram Records, Inc. is now known as UMG Recordings, Inc. Respondents MCA Records, Inc., A&M Records, Inc., and Motown Records, Inc. are divisions of UMG Recordings, Inc. The parent company of UMG Recordings, Inc. is Universal Studios, Inc. The shares of Universal Studios, Inc. are not publicly traded. Universal Studios, Inc. is owned by Vivendi Universal S.A. (92%), a French corporation whose shares are publicly traded, and Matsushita Electric Industrial Co., Ltd. (8%), a Japanese company whose shares are publicly traded. No other publicly held company owns 10% or more of the stock of any of the respondents listed in this paragraph.

The immediate parent company of respondent Capitol Records, Inc. is EMI Group North America Holdings, Inc.; the ultimate parent company is EMI Group PLC. No publicly held company owns 10% or more of respondent Capitol Records, Inc.'s stock.

The ultimate parent company of respondents Warner Music Group Inc., Warner Bros. Records, Inc., and Rhino Entertainment Company is AOL Time Warner Inc. No other publicly held company owns 10% or more of the stock of any of the respondents listed in this paragraph.

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Respondents Capitol Records, Inc., Sony Music Entertainment Inc., MCA Records, Inc., A&M Records, Inc., Motown Records, Inc., Polygram Records, Inc., Bertelsmann Music Group, Inc., Warner Music Group, Inc., Warner Bros. Records, Inc., Rhino Entertainment Company, and their affiliates (referred to below as the "Record Company Defendants") respectfully request that this Court deny the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Petitioners are recording artists who are members of the American Federation of Television and Radio Artists ("AFTRA"). Since the 1950s, AFTRA and the Record Company Defendants (or their predecessors) have been parties to the AFTRA Code of Fair Practice for Phonograph Recordings, a collective bargaining agreement known as the "Phono Code." Pet. App. 4a. The Phono Code requires the Record Company Defendants to make contributions to two multi-employer benefit funds on behalf of AFTRA members, based on a percentage of the "gross compensation actually paid" to each recording artist. *Id.* The funds, in turn, provide health and retirement benefits to AFTRA members and their beneficiaries.

The Record Company Defendants send a semi-annual statement to each recording artist detailing the amount of gross compensation paid to the artist during the previous six months. The Phono Code requires the Record Company Defendants to send earnings statements to the funds, reporting the amount of contributions owed to the funds based on the compensation paid to each AFTRA member. Pet. App. 5a. Over time, disputes arose between the trustees of the funds and the Record Company Defendants over the precise meaning of "gross compensation actually paid," a phrase which was not defined in the original version of the Phono Code. *Id.* at 6a.

The dispute centered on the treatment of various production and distribution costs associated with producing and selling records. The Record Company Defendants typically fronted certain costs on behalf of the artists (such as expenses for studio time and accompanying musicians), and then deducted those costs from the royalties paid to the artists. Pet. App. 6a. The Record Company Defendants interpreted the Phono Code to require payment of contributions to the funds based on the amount of royalties actually paid to the recording artists; the trustees of the funds took the position that contributions should be made based on the amount of royalties earned before fronted costs were deducted. *Id.*

The trustees of the funds and the Record Company Defendants attempted to resolve their dispute through negotiations. These negotiations eventually led to an amendment of the Phono Code in 1995 that defined the term "gross compensation" in a manner mutually acceptable to the parties. Pet. App. 7a. During the course of the dispute over the meaning of the Phono Code, the trustees of the funds elected not to pursue litigation seeking to enforce the funds' interpretation of the Code's language. As the Eleventh Circuit noted, sound reasons supported this judgment:

> The record indicates that the Funds Trustees chose not to litigate the issue because (1) the chance that they would prevail was far from clear, and, if they lost the case, the Funds' assets would be depleted, and (2) their periodic audits of the record companies' semi-annual statements to the singers had produced adequate resolutions of the singers' claims that the companies had under-reported gross compensation, and thus the amount of the contribution due the Funds.

Id. at 7a n.8.

Petitioners filed this action in 1993 in an attempt to recover the contributions that they contend the Record Company Defendants underpaid from the 1970s until the Phono Code

was amended in 1995. As relevant here, the Record Company Defendants were named in three counts of the complaint. In count one, petitioners asserted a "derivative" claim on behalf of the funds seeking recovery of the allegedly delinquent contributions under section 502(g)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. *See* 29 U.S.C. § 1132(g)(2). In count four, petitioners asserted a claim for "appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). And in count seven, petitioners alleged a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U.S.C. § 1964(c). Petitioners also asserted several claims against the trustees of the funds, alleging that they breached their fiduciary duties under ERISA when they decided not to sue the Record Company Defendants to collect the allegedly delinquent contributions.

Only a few of the district court's numerous pre-trial rulings are implicated here. The district court granted the Record Company Defendants' motion to dismiss the ERISA counts (counts one and four) pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. 44a-46a. The district court denied petitioners' motion for class certification of the RICO claim against the Record Company Defendants, and denied petitioners' motion for class certification of the breach of fiduciary duty claims against the trustees of the funds. *Id.* at 33a-38a. The RICO and breach of fiduciary duty claims on behalf of the individual named plaintiffs remain pending in the district court, along with various state-law claims not relevant here.

Petitioners asked the district court to enter a partial final judgment on counts one and four pursuant to Federal Rule of Civil Procedure 54(b), so that petitioners could take an immediate appeal from the district court's order dismissing those counts. Pet. App. 31a-32a. Petitioners also sought permission to appeal the district court's interlocutory orders

denying class certification of the RICO and breach of fiduciary duty claims pursuant to 28 U.S.C. § 1292(b). Pet. App. 2a. The Eleventh Circuit consolidated the two appeals and affirmed the district court's rulings in all respects.

REASONS FOR DENYING THE PETITION

I. REVIEW SHOULD BE DENIED ON THE FIRST QUESTION PRESENTED, GIVEN THE LACK OF A CIRCUIT SPLIT AFTER *MERTENS* AND THE INTERLOCUTORY POSTURE OF THE CASE.

The sole basis petitioners assert for review of the first question presented is an alleged conflict between the decision below and decisions of the Second and Third Circuits in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912 (2d Cir. 1989), and *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), which held that participants and beneficiaries have standing to bring a claim for delinquent contributions under ERISA. Those cases, however, were decided before this Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), which rejected the approach to statutory construction employed by *Struble* and *Diduck*. No circuit post-*Mertens* has held that participants and beneficiaries have standing to bring a derivative claim for delinquent contributions against an employer. Thus, in the wake of *Mertens*, there is no indication that the lower courts lack clear guidance on this issue. Moreover, the Second and Third Circuits have not had an opportunity to reexamine their earlier decisions in light of *Mertens*. Review at this juncture would be decidedly premature.

Even if the first question presented warranted review, this case would provide a poor vehicle for resolving the issue petitioners raise. Under petitioners' own construction of the claim, a derivative action for delinquent contributions may be brought only if the plaintiff first establishes that the trustees

of the fund breached their fiduciary duties by failing to file suit against the employer. Whether the trustees of the funds involved in this case are guilty of such a breach is an issue still pending before the district court, and has yet to be resolved. If the district court determines that no breach of fiduciary duty occurred in this case, petitioners' derivative claim will be subject to dismissal on grounds wholly independent of the statutory-construction issue raised in the petition. Thus, at this interlocutory stage of the litigation, petitioners seek review of an issue whose resolution may prove completely unnecessary to the disposition of the case.

A. The Eleventh Circuit Correctly Analyzed the Statutory Text in Light of the Principles Established in *Mertens*.

The Eleventh Circuit declined to follow the lead of the Second and Third Circuits in *Diduck* and *Struble* because it concluded that this Court's intervening decision in *Mertens* had called into doubt the continued validity of those earlier precedents. In *Mertens*, the Court confronted the question whether ERISA permits suits for money damages against a nonfiduciary who knowingly participates in a breach of fiduciary duty. The Court began its analysis by questioning whether the text of ERISA authorized suits against nonfiduciaries at all. The Court noted that, although ERISA contains various provisions imposing obligations upon nonfiduciaries, "no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." 508 U.S. at 254. The Court found it unlikely that this omission was a mere oversight, given the fact that nonfiduciaries could be held liable for knowingly participating in a breach of fiduciary duty under well-established principles of trust law. *Id.* The Court reiterated its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot

to incorporate expressly.'" *Id.* (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).

The Court ultimately held in *Mertens* that, even assuming ERISA authorized a cause of action against nonfiduciaries for knowing participation in a fiduciary breach, the statute did not permit recovery of money damages in such suits. 508 U.S. at 255. The plaintiffs argued that this interpretation undermined the basic purpose of ERISA -- protecting plan participants and beneficiaries -- because it left them with less protection than the common law of trusts afforded before ERISA was enacted. The Court rejected this argument, stating that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs." *Id.* at 261-62 (citation omitted). The Court declined to "adjust the balance between th[e] competing goals [of protecting employees and containing pension costs] that the text adopted by Congress has struck." *Id.* at 263.

The Eleventh Circuit faithfully applied the approach to statutory construction dictated by *Mertens* in construing the ERISA provisions at issue in this case. *See* Pet. App. 15a-24a. Thus, the court of appeals carefully scrutinized the language of ERISA § 502(g), on which petitioners purport to base their derivative claim. That provision provides, in relevant part:

> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.
>
> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title

> [requiring employers to make contributions as dictated by the terms of the plan] in which a judgment in favor of the plan is awarded, the court shall award the plan --
>
> (A) the unpaid contributions . . . .

29 U.S.C. § 1132(g).

The court below correctly held that the plain language of section 502(g) excludes participants and beneficiaries from the class of persons authorized to bring an action to collect unpaid contributions. Subsection (g)(2) expressly states that an award of unpaid contributions may be made only in an action brought "*by a fiduciary* for or on behalf of a plan." 29 U.S.C. § 1132(g)(2) (emphasis added). The omission of participants and beneficiaries from this provision was not inadvertent, as is evident from an examination of subsection (g)(1). That provision governs "any action" *except* a suit for unpaid contributions, and refers explicitly to participants, beneficiaries, *and* fiduciaries. As this Court has held, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

The Eleventh Circuit found support for its interpretation of the text in the statutory history of section 502(g). As the court noted, the House version of the bill that added subsection 502(g)(2) in 1980 would have authorized "any person" to sue to collect delinquent contributions. However, Congress enacted the narrower Senate version of the bill, which expressly limited authority to bring claims for delinquent contributions to fiduciaries alone. Pet. App. 22a-23a. The court below observed that, "[g]iven this legislative history, we do not believe that Congress wanted beneficiaries to have standing to bring suit on behalf of the plan for delinquent contribution[s]." *Id.* at 23a.

Sound reasons support Congress' decision to confer standing solely on fiduciaries in this context. Allowing participants and beneficiaries to bring a derivative action on behalf of the fund when the trustees have determined that such a suit is not in the best interests of the fund would interfere with plan administration and raise the potential for abusive strike suits. The Eleventh Circuit correctly noted that, "[b]y allowing any beneficiary willing to allege a breach of fiduciary duty to bring a derivative suit, the Second and Third Circuits have permitted that beneficiary to substitute his or her judgment for that of the trustees." Pet. App. 21a-22a. To avoid precisely this form of disruption to plan administration, Congress gave plan fiduciaries alone the power to bring suits for delinquent contributions, and granted participants and beneficiaries authority to police their performance through an action for breach of fiduciary duty under ERISA §§ 409 and 502(a)(2). *See* 29 U.S.C. §§ 1109, 1132(a)(2).

B. *Struble* and *Diduck* Are Inconsistent With *Mertens*.

The approach to statutory construction established by the Court in *Mertens* is fundamentally at odds with the approach followed in *Struble* and *Diduck*. In *Struble*, the Third Circuit held that the plaintiffs could assert a derivative claim for delinquent contributions if they first established "that the Trustees . . . breached their fiduciary duties . . . by failing to enforce the Fund's rights to the required amounts of Employer contributions." 732 F.2d at 336-37.* In arriving at

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* *Diduck* reached the same conclusion, although the Second Circuit offered no analysis of its own on this issue. *See* 874 F.2d at 916. The Second Circuit merely relied without comment on its earlier decision in *Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, 80 (2d Cir. 1986), and the Third Circuit's decisions in *Struble* and *McMahon v. McDonell*, 794 F.2d 100, 108-11 (3d Cir. 1986). Both *Alfarone* and *McMahon*, in turn, merely cite *Struble* for the proposition that a derivative claim may be

this conclusion, the Third Circuit did not purport to rely upon the text of ERISA (which specifically limits the right to bring an action for unpaid contributions to fiduciaries alone), nor did it analyze the statutory history of section 502(g). Instead, the court relied heavily on general principles of trust law, reasoning that it was proper to infer a derivative claim for delinquent contributions because a similar claim had existed at common law and the claim was generally consistent with ERISA's basic purpose.

Mertens forecloses this nontextual approach to statutory construction under ERISA. As the Court made clear, the fact that a particular cause of action was well established under trust law but nonetheless omitted from the detailed remedial scheme established in ERISA strongly suggests that the omission was deliberate rather than inadvertent. *See* 508 U.S. at 254. In the face of such omissions, courts are not free to "revise the text of the statute" in order to supplement the remedies Congress created. *Id.* at 259. The court in *Struble* did exactly what *Mertens* admonishes courts *not* to do: it substituted "vague notions" of the statute's purpose for "the words of the text regarding the specific issue under consideration," *id.* at 261 (emphasis omitted). The Third Circuit's frank acknowledgment that the only ERISA provision authorizing recovery of delinquent contributions was explicitly limited to plan fiduciaries, *see Struble*, 732 F.2d at 337-38, should have disposed of the plaintiffs' derivative claim without more.

Petitioners' sole argument in defense of the result reached in *Struble* and *Diduck* rests on their contention that "[t]he language of the statute is *not inconsistent with*" the derivative claim for delinquent contributions they advocate. Pet. 13 (emphasis added). The dissent in *Mertens* made a similar argument there, contending that "the statute clearly does not

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maintained under ERISA; neither decision offers any independent analysis to support that conclusion.

bar" a suit against nonfiduciaries. *See Mertens*, 508 U.S. at 265 n.1. The Court's response was blunt and emphatic: "That, of course, is not the issue. The issue is whether the statute affirmatively *authorizes* such a suit." *Id.* at 255 n.5. Here, petitioners concede that section 502(g) does not affirmatively authorize a derivative claim for delinquent contributions. *See* Pet. 13 ("The statute does not address the availability of a derivative action to enforce the rights conferred by the statute."). After *Mertens*, that concession is fatal to the reading of the statute petitioners advance, and simply confirms the fact that *Diduck* and *Struble* are no longer good law.

Since this Court's decision in *Mertens*, no circuit has held that participants and beneficiaries have standing under ERISA to bring a derivative claim for delinquent contributions. Indeed, the circuits have consistently heeded the Court's directive and have refused to create new claims that lack a textual basis in ERISA. *See, e.g., Buckley Dement, Inc. v. Travelers Plan Administrators of Ill., Inc.*, 39 F.3d 784, 789 (7th Cir. 1994); *Reich v. Rowe*, 20 F.3d 25, 30 (1st Cir. 1994). The Second and Third Circuits should be given an opportunity to follow suit and revisit their earlier decisions. Given the fact that only the decision below has analyzed the question presented with the benefit of this Court's teaching in *Mertens*, review at this juncture would be manifestly premature.

C. This Case Provides a Poor Vehicle for Reviewing the Question Presented.

Even if the first question presented warranted review, this case would provide a poor vehicle for resolving the issue petitioners raise here. Under petitioners' own construction of the derivative claim, they must first demonstrate that the trustees of the fund breached their fiduciary duties by not suing to collect the allegedly delinquent contributions. Because of the interlocutory posture of the case, however,

that issue has not been resolved. Petitioners have brought claims for breach of fiduciary duty against the trustees, and those claims (on behalf of the individual named plaintiffs) are still pending before the district court. As petitioners themselves concede, if they do not prevail on their fiduciary breach claims, their derivative claim must be dismissed in any event. *See* Pet. 14 ("Should petitioners fail to establish fiduciary breach under Section 502(a)(2), the derivative suit would fail as well.")

Thus, petitioners seek review of an issue that, depending on rulings the district court has yet to make, may not need to be addressed in order to dispose of this litigation. For example, if the district court ultimately grants summary judgment for the trustees on the issue of fiduciary breach, any ruling by this Court on the existence of a derivative claim under ERISA will amount to little more than an advisory opinion. The Court has traditionally declined to expend its scarce resources reviewing issues raised at an interlocutory stage whose resolution may be rendered unnecessary by further proceedings in the lower courts. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*). There is good reason to believe that resolution of the derivative-claim issue will prove unnecessary here. *See* Pet. App. 7a n.8 (suggesting that, in Eleventh Circuit's view, trustees are likely to prevail on breach of fiduciary duty claims).

II. THE THIRD QUESTION PRESENTED, INVOLVING DISMISSAL OF PETITIONERS' CLAIM UNDER ERISA § 502(A)(3), IS FACTBOUND AND MERITLESS.

The district court dismissed count four of petitioners' complaint, which asserted a claim for "appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for failure to state a claim on which relief could be granted. Pet. App. 45a-46a. The court of appeals affirmed the district

court's ruling on a different ground relating to a pleading deficiency. *Id.* at 25a-26a. Petitioners simply contend that both courts erred in ruling as they did. At best, petitioners seek nothing more than factbound error correction, and review is therefore unwarranted.

Petitioners contend that the district court erred in applying *Varity Corp. v. Howe*, 516 U.S. 489 (1996), to the facts of this case. In *Varity*, the Court held that ERISA's "catchall" remedial provision, ERISA § 502(a)(3), does not afford relief when Congress has provided an adequate remedy for a beneficiary's injuries under other provisions. 516 U.S. at 515. Petitioners contended below, as they do here, that they are entitled to relief under section 502(a)(3) because dismissal of their derivative claim leaves them with no remedy for the Record Company Defendants' alleged failure to make the required contributions to the funds. The district court squarely rejected this contention: "[U]nlike the situation in [*Varity*], this is not a case where the relief plaintiffs seek is 'appropriate' equitable relief. Congress has provided plaintiffs with an appropriate remedy and further equitable relief is not mandated." Pet. App. 45a-46a.

That conclusion is undoubtedly correct. As the Eleventh Circuit noted, dismissal of petitioners' derivative claim does not leave them without a remedy, since petitioners can obtain full recovery from the trustees in the event that they prove the trustees breached their fiduciary duties by not attempting to collect the allegedly delinquent contributions. *Id.* at 24a. ERISA § 409(a) expressly provides that trustees who breach their fiduciary duties "shall be personally liable to make good to [the] plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). And section 502(a)(2) provides participants and beneficiaries with a cause of action to enforce the provisions of section 409(a). *See* 29 U.S.C. § 1132(a)(2). Thus, petitioners are simply wrong when they assert that dismissal of their section 502(a)(3) claim leaves them "with no remedy under ERISA at all." Pet. 22. In view

of the fact that Congress has provided petitioners with an adequate remedy under ERISA § 502(a)(2), the district court correctly held that *Varity* was inapposite here.

In any event, the Eleventh Circuit found it unnecessary to reach the issue addressed by the district court because it concluded that count four had to be dismissed for pleading deficiencies. Pet. App. 25a-26a. The court of appeals noted that petitioners' complaint resembled the "shotgun" pleading condemned in a number of its earlier decisions: the complaint was 96 pages long, contained 232 numbered paragraphs, and was drafted so that each count incorporated by reference all previous paragraphs. *Id.* at 8a. The court affirmed the dismissal of count four because it contained no allegation that "the Record Company Defendants violated a substantive provision of ERISA or the terms of the Funds." *Id.* at 25a. The court concluded that "[w]e would be in serious dereliction of our appellate duty . . . if we allowed this sort of 'shotgun pleading' to substitute for, at a bare minimum, an allegation of what law these defendants purportedly broke." *Id.* at 26a.

Contrary to petitioners' contention, the Eleventh Circuit did not "creat[e] a pleading standard at variance with established law." Pet. 24. The court of appeals merely applied well-settled Eleventh Circuit precedent, which had previously held "shotgun" pleadings subject to dismissal for failure to state a claim, *see, e.g., Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19 (11th Cir. 1991), to the facts of this case. Petitioners do not raise any issue of general importance here; they merely complain about a ruling that is of consequence only to the parties involved in this case. Review should be denied.

III. THE RICO ISSUE RAISED BY PETITIONERS WAS NOT ADDRESSED BY THE DECISION BELOW.

In the district court, petitioners moved unsuccessfully for class certification of their RICO claim against the Record

Company Defendants pursuant to Federal Rule of Civil Procedure 23. Petitioners based their RICO claim on predicate acts of alleged mail fraud. Petitioners seek review in this Court of the question whether the reliance element of the mail-fraud scheme they allege may be established on a class-wide basis. The Eleventh Circuit never addressed this issue, however, because it affirmed the denial of class certification on an entirely independent ground. Thus, the question on which petitioners seek review is simply not raised by the decision below.

The heart of petitioners' RICO claim is their contention that the earnings statements mailed by the Record Company Defendants to the funds contained false statements regarding the amount of compensation earned by each recording artist. *See* Pet. App. 12a. The district court denied petitioners' motion for class certification of the RICO claim because it concluded that "the mail fraud allegations can be determined only by a detailed examination of the facts and circumstances surrounding the Record Company defendants' contributions with respect to each performer/artist and are not appropriate for classwide resolution." *Id.* at 38a. Petitioners note that, in denying their motion for class certification, the district court also stated that, "to establish mail fraud, each class member will have to show reliance on defendant's alleged fraudulent conduct." *Id.* at 37a-38a. Based on that single passage from the district court's order denying class certification, petitioners argue that review should be granted to decide whether they must prove individual reliance on the earnings statements mailed to them, or whether it is sufficient that the funds relied on those statements when determining the level of benefits owed.

The court of appeals never addressed this issue. It began with the assumption that each element of petitioners' RICO claim had been established, including reliance. Pet. App. 13a. But the court concluded that most of the questions of fact raised by petitioners' RICO claim were not common to the

class. In particular, the court held that petitioners could not establish the alleged falsity of the representations contained in the earnings statements absent a detailed examination of each individual contract between a recording artist and the record company involved.

> Because the singers' contracts with the record companies were not identical -- in terms of the royalties to be paid the singers and the parties' allocation of expenses -- only by undertaking such examination could the court know what expenses the record company fronted the singer and thus the expenses that should or should not have been included as gross compensation in the company's semi-annual statement.

Id. at 10a; *see also id.* at 13a. The Eleventh Circuit correctly concluded that, "[f]or a court to determine which statements contained errors would be a monumental task that could not reasonably be undertaken in one lawsuit." *Id.* at 13a-14a. For this reason -- having nothing to do with the reliance element of mail fraud -- the court of appeals held that "common questions of law and fact do not predominate over individual issues," as required under Rule 23(b)(3). *Id.* at 14a.

Petitioners do not contest the correctness of the Eleventh Circuit's ruling that the alleged *falsity of the earnings statements* could not be established on a class-wide basis. The issue petitioners raise here relating to proof of reliance was not the basis on which the court of appeals affirmed the district court's denial of class certification. Because the decision below does not address the question presented in the petition, review should be denied. *See Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (this Court ordinarily declines to consider questions presented in petition for certiorari that were not addressed by court of appeals).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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